Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-348

EQUIPMENT RENTAL CORPORATION,
t/a AMERICAN EQUIPMENT RENTAL COMPANY,
Petitioner,

v.

TIDEWATER EQUIPMENT CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

EQUIPMENT RENTAL CORPORATION,
t/a AMERICAN EQUIPMENT RENTAL COMPANY,
Petitioner,

v.

TIDEWATER EQUIPMENT CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW.

The opinion of the United States District Court for the District of Maryland, rendered orally on October 31, 1977, is reproduced in full in Appendix A, beginning at page A1. The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, rendered on February 20, 1979, is reproduced in Appendix B, beginning at page A5. The Order of the Court of Appeals denying Rehearing and Suggestion of Rehearing *en banc,* rendered on April 13, 1979, is reproduced in Appendix C, beginning at page A13. The Order denying the request for reconsideration of the petition for Rehearing and Suggestion for Rehearing *en banc,* rendered on August 3, 1979, is reproduced in Appendix D, beginning at page A14.

JURISDICTION.

The jurisdiction of the United States District Court for the District of Maryland was invoked pursuant to 28 U. S. C. § 1332(a). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U. S. C. §1254(1).

By Order dated June 12, 1979, the Honorable Warren E. Burger granted Petitioner's Application for Extension Time Within Which to File a Petition for Writ of Certiorari, extending the time within which to file this Petition for Certiorari to August 31, 1979. A copy of this Order is attached as Appendix E, beginning at page A16.

QUESTIONS PRESENTED.

I. Did the Fourth Circuit Court of Appeals violate the clear precedents of this Court, thereby creating a conflict amongst the various Circuit Courts, when it exceeded the limits of appropriate appellate review and violated the strictures of Rule 52(a) of the Federal Rules of Civil Procedure by substituting its own determination on the credibility of witnesses for those of the District Court?

II. (a) Did the Court of Appeals deprive Petitioner of Due Process by ordering Petitioner to pay over profits which it had legitimately obtained without affording Petitioner either notice or a hearing on this issue?

(b) Did the Court of Appeals deprive Petitioner of Procedural Due Process by taking into consideration facts which had not been introduced at trial, and rendering a decision based on these facts without giving Petitioner an opportunity to rebut these facts or object to their being introduced?

III. Did the Court of Appeals fail to apply the appropriate Maryland law in violation of the requirements of *Erie v. Tompkins*, 304 U. S. 64 (1938)?

IV. Is the decision of the Court of Appeals so clearly erroneous as to allow for summary reversal?

STATEMENT OF THE CASE.

Petitioner, Equipment Rental Corporation trading as American Equipment Rental Company ("American"), and Respondent Tidewater Equipment Co., Inc. ("Tidewater") entered into a written lease agreement on August 12, 1975, whereby Tidewater leased to American a 300 ton crane. The lease provided that American would pay a monthly rental of Fifteen Thousand Dollars ($15,000.00) based on the crane's use for two hundred (200) "working hours" per month. At the time the contract was signed, Tidewater knew that American intended to sublease the crane at a profitable rental rate to a Canadian firm, Canadian Bellequip, for use at the construction site of the Montreal Olympics. In addition, American advised Tidewater at the time the lease was entered into that the crane engine would often be idling as much as twenty-four (24) hours per day, due to the freezing winter conditions in Montreal, but that it would not be lifting and lowering more than the standard eight (8) hour "shift" in any 24 hour period. Tidewater, when agreeing to this arrangement, explicitly agreed to base its rentals on "working hours" no matter how long the engine was being idled to keep from freezing.

After signing the lease with Tidewater, American executed a *distinct and separate* sublease with Canadian Bellequip. The rentals under this sublease were based, at Canadian Bellequip's instructions, on "meter hours", evidenced by a meter which ran whenever the crane engine was idling. Through the sublease, American was able to make a legitimate profit over and above the amount it expected to pay Tidewater for the "working hours" for which it was responsible under the terms of the lease, which was

the reason American entered into such a tripartite agreement.

American returned the crane to Tidewater at the termination of the lease and paid the rentals due, based on the number of hours the crane had actually worked in preparation for the Montreal Olympics. Tidewater, noting that the hours on the meter exceeded those which would be expected had the engine only been running for eight hours per day, and hoping to extract from American the profits which American had received under the sublease with Canadian Bellequip, instituted an action for breach of contract in the United States District Court for the District of Maryland. Tidewater's Complaint alleged, *inter alia,* that American owed additional rentals for all of the hours shown on the meter in excess of the two hundred "working hours" per month agreed upon in the lease.

The trial in the District Court was limited to the issue of the proper interpretation of the term "working hours". After trial, the District Court Judge entered judgment in favor of American. The trial judge based this judgment on his determination of the credibility of the American's witness, Mr. Cunningham, who testified that the term "working hours" meant the hours the crane was actually lifting and lowering. The trial judge specifically rejected evidence contradicting Mr. Cunningham's testimony, and further found that Tidewater had failed in its burden of proving damages under the lease.

In its unpublished opinion the Court of Appeals found that the testimony of Mr. Cunningham, as to the meaning of the term "working hours" was too implausible to be accepted" (A11, n. 5) *thereby usurping the trial judge's function in determining the facts based on the credibility of witnesses.* The Court of Appeals, in reversing also misconstrued facts, not introduced at trial, concerning a judgment, entered by confession on behalf of American against Canadian Bellequip in the United States District Court for Eastern District of Pennsylvania.[1] By interrelating these two separate and distinct contracts the Court determined that American had been unjustly enriched even though the facts to support this conclusion, and the issues raised thereby, had not been litigated at trial before the District Court of Maryland. Additionally, the Fourth Circuit failed to abide by the applicable Maryland law concerning contract construction.

In each and every respect, the Fourth Circuit's entry of judgment in favor of Tidewater was improper, and mandates a reversal.

1. This judgment, entered in the Eastern District of Pennsylvania prior to trial in Maryland, in the amount of approximately $129,000, was marked "satisfied" after the conclusion of the trial of this case. At trial Petitioner's witness testified that the Eastern District of Pennsylvania suit was still in litigation. The satisfaction was entered on the Eastern District of Pennsylvania judgment after the conclusion of the Maryland trial as the result of a settlement in the amount of $65,000 of American's claim against Canadian Bellequip.

REASONS FOR GRANTING THE WRIT.

I.

The Opinion of the Circuit Court, Reversing the Trial Court's Findings on the Credibility of Witnesses, Failed to Apply the Clear Precedents of This Court, and Has Created a Split Amongst the Various Circuits Regarding the Scope of Appropriate Appellate Review.

The judgment entered by the District Court in favor of American was based on the testimony of American's principal witness, Henry Cunningham as well as the documentary evidence which was introduced at trial. Mr. Cunningham testified that the crucial term "working hours" contained in the written lease was negotiated by the parties to the contract to mean the amount of time that the crane was actually lifting and lowering, and not the number of hours shown on the crane's meter which ran whenever the crane engine was idling. The Court specifically ruled that the term "working hours" did not mean "meter hours" as testified to by William Bozman, Tidewater's witness. Despite the clear findings of the trial judge on this point, the Court of Appeals inexplicably labelled Cunningham's testimony "implausible" (A11, n. 5), thereby reversing the trial judge's determination of credibility. The Court of Appeals gave no explanation as to why Cunningham's testimony was "implausible", and ignored Rule 52(a) of the Federal Rules of Civil Procedure, which states:

> Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. (Emphasis added.)

The stringency of the rule, that findings based on conflicting oral testimony should not be set aside, is based on the trial judge's superior opportunity to observe the demeanor of the witnesses and his being in the best position to judge which of the opposing versions of the facts is more credible in light of all of the other evidence.[2] The mere fact that a panel of the Court of Appeals might reach a contrary result does not mean that it can substitute its judgment for that of the trial court where the trial court's findings are not clearly erroneous.

A finding is clearly erroneous only where, although there is evidence to support such a finding, the reviewing Court is left with the firm belief that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364, 397 (1948). It is not enough, however, that a reviewing Court might give the facts another construction, or give a more sinister cast to actions which the trial court deemed innocent. *United States v. National Ass'n. of Real Estate Bds.*, 339 U. S. 485, 495 (1950).

Despite the limited scope of review allowed by the Supreme Court in non-jury cases, the Court of Appeals in this case has recast all the evidence in a light unfavorable to American, and only in this way could it reach the

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2. See e.g.: *Mazzella Blasting Mat Co. v. Vitiello*, 250 F. 2d 935 (2d Cir. 1957); *Eastern Express, Inc. v. Mack Warehouse Corp.*, 326 F. 2d 554 (3d Cir. 1964), cert. denied 377 U. S. 966, 84 S. Ct. 1647, 12 L. Ed. 2d 737; *The B's Company, Inc. v. B. P. Barber & Associates*, 391 F. 2d 130 (4th Cir. 1968); *Bryan v. Kershaw*, 366 F. 2d 499 (5th Cir. 1966) cert. denied, 386 U. S. 959, 87 S. Ct. 1030, 18 L. Ed. 2d 108; *Pollice v. Hartford Fire Insurance Company*, 355 F. 2d 524 (7th Cir. 1965); *Bright v. Taylor*, 554 F. 2d 854 (8th Cir. 1977); *Tonkoff v. Barr*, 245 F. 2d 742 (9th Cir. 1957); *Johns Manville Corp. v. Ladd*, 117 U. S. App. D. C. 262, 328 F. 2d 563 (D. C. Cir. 1964).

conclusion to reverse the trial judge's determination on credibility. In so doing, the Fourth Circuit is in conflict with the decision of the Court of Appeals for the Fifth Circuit, in *Armour v. City of Anniston*, 597 F.2d 46, 481 (C. A. 5, 1979), which held:

> It is not in our province on appeal to make the credibility choices necessary to decide this case. We are satisfied that there was ample evidence upon which the Court could have made its findings.

Since the trial Court in this case listened to and observed the witnesses who testified, and reached its conclusions based on the testimony, as well as the documents which were submitted into evidence, including the lease and sublease,[3] the reversal of his judgment by the Circuit Court amounted to a trial *de novo*, a procedure which must not be permitted. *United States v. Yellow Cab Co.*, 70 S. Ct. 177, 179 (1950). The opinion of the Court of Appeals in this case being in direct conflict with the Fifth Circuit's opinion in *Armour*, on an issue critical in both trial and appellate advocacy, certiorari should be granted to resolve the conflict. The refusal to grant Certiorari will result in trial counsel's always choosing jury trials, where verdicts will not be reversed on appeal absent a lack of evidence to support such a verdict. *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U. S. 163, 170 (1943); *United States v. United States Gypsum Co., supra*, at p. 397. The impartial administration of justice requires that non-jury and jury trials not be subject to varying standards of appellate review.

3. Both the original lease between Tidewater and American and the sublease between American and Canadian Bellequip were introduced at trial, and the trial judge had the opportunity to compare both leases in light of all the testimony.

II.

The Court of Appeals, Believing That Petitioner Received $129,000.00 From Its Sublessee, and Concluding That the District Court's Judgment Would Thereby Cause Petitioner to Be Unjustly Enriched, Based Its Decision on Facts Not of Record, and Deprived Petitioner of the Benefit of Due Process.

The Court of Appeals' concluded, without any factual support in the trial record, that American received approximately $129,000.00 from Canadian Bellequip under its sublease. This conclusion is based on documents which were never introduced into the trial record.

As evidenced by the affidavit of Norman L. Holmes, Esquire, which is attached as Appendix F, (A17) American in fact received only $65,000.00 from Canadian Bellequip pursuant to a Mutual Release and Settlement Agreement which resolved the litigation in the Eastern District of Pennsylvania. From the proceeds of this settlement, American paid Tidewater $20,923.99 in settlement of Counts I, II and IV of Tidewater's Complaint in this case. It was only after receipt of the settlement amount of $65,000 that American marked the judgment in the Eastern District of Pennsylvania as "Satisfied", pursuant to its obligation under the Settlement Agreement. By misconstruing the facts of the action in the Eastern District of Pennsylvania, and concluding that American had, in its view, unjustly received $129,000.00, the Court of Appeals failed to give American notice that these facts were at issue, or the opportunity to present evidence in its own behalf as to the Canadian Bellequip Contract, the action in the Eastern District of Pennsylvania, and the Settlement Agreement which was signed by American and Canadian Bellequip.

At a minimum, American was entitled to notice and a trial on this issue prior to the rendering of a decision on

the merits by the Court of Appeals. *In re Murchison*, 349 U. S. 133, 136 (1955); *Armstrong v. Manzo*, 380 U. S. 548, 550 (1965); *Withrow v. Larkin*, 421 U. S. 35, 46 (1974). In *Murchison*, a criminal case, the state court judge heard testimony of various witnesses at a grand jury hearing, charged two of the witnesses with crimes, and subsequently tried and found guilty these two defendants. The Supreme Court reversed the conviction, not because the judge had presumed an adversary position, but because he relied on his own personal knowledge and impressions which could not be tested by adequate cross examination.

This Court's decision in *Jackson v. Denno*, 378 U. S. 368 (1964) also mandates reversal of the Court of Appeals. There, the Court held that a criminal defendant was deprived of due process where a conviction was based, in part or in whole, upon an involuntary confession, even though there was other evidence to support the conviction. *Id.* at 376. It was also equally clear in *Jackson* that a criminal defendant had the right at some stage of the proceedings to object to the use of this confession. *Id.*, at p. 377.

That *Jackson* and *Murchison* are both criminal cases should not prevent this Court from applying the same standards of due process in this civil matter. To allow the Circuit in this case to review facts which were never introduced at trial, make its own conclusions based, in whole or in part, on impressions thus formed, and prevent American the opportunity to either rebut these facts or to object to their being used, deprives American of the basic fundamentals of due process required by the Fifth Amendment to the United States Constitution.

Indeed, it seems clear that the protections afforded criminal defendants, where their liberty interests are at stake, should be extended to civil litigants where their

property interests are as seriously affected as evidenced by the Court of Appeals in this matter.

This conclusion finds clear support in *Armstrong v. Manzo*, 380 U. S. 548 (1965), where this Court held:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Id.*, at p. 550.

The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo, supra*, at p. 552. That the Court of Appeals should take it upon itself to review facts on appeal which were not presented at the trial of this matter, without notice that this was being done, is wholly inappropriate and a clear violation of due process.

III.

The Appellate Court Erred by Failing to Apply Maryland Law Respecting the Interpretation of Contracts.

Since this action was based on diversity jurisdiction, the trial judge was required to look to Maryland law for the appropriate substantive law. *Erie v. Tompkins*, 304 U. S. 64 (1938). Since the law of Maryland would require a decision in American's favor, no matter what construction is placed on the phrase "working hours" it was clear error for the Court of Appeals not to affirm the application of Maryland law, but rather to resort to the equitable remedy of reforming the contract for the benefit of Tidewater.

Under Maryland law, the parties to a contract are held to the ordinary meaning of their words, regardless of any unexpressed subjective intent to the contrary. *Weber v. Crown Central Petroleum Corp.*, 214 Md. 115, 132 A. 2d 857 (1957); *Orkin v. Jacobson*, 274 Md. 124, 332 A. 2d 901 (1975); *Kasten Constr. Co. v. Rod Enterprises, Inc.*, 268 Md. 318, 301 A. 2d 12 (1973). Thus, if Tidewater entered into a contract whose written terms clearly bear a meaning different from an unexpressed subjective intent, it was nonetheless bound by that written contract. See, e.g., *Chertkof v. Harry C. Weiskittel Co., Inc.*, 251 Md. 544, 248 A. 2d 373 (1968); *Rossi v. Douglas*, 203 Md. 190, 100 A. 2d 3 (1953).

As stated in *Weber v. Crown Central Petroleum Corp., supra*, 214 Md. at 120, 132 A. 2d at 859 (quoting Restatement of Contracts § 230):

> The standards of interpretation . . . is the meaning that would be attached to the [contract] by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the [contract], other than oral statements by the parties of what they intended it to mean.

The fact that "working hours" is an unusual phrase in equipment rental contracts is highly probative. It must have called the attention of the parties to the nature of the limitation of this phrase (particularly in view of the fact that the crane belonged to Tidewater which knew of the existence of the meter), and it would have been extremely easy to phrase the contract in terms of meter hours as American did in its contract with Canadian Bellequip. *See: Chesapeake Isle, Inc. v. Rolling Hills Development Co.*, 248 Md. 449, 237 A. 2d 1 (1968).

Additionally, while the basic principles of contract construction under Maryland law instruct that an ambiguous provision be construed against the drafter of that provision [*Lakrest Development Co. v. Eisell*, 258 Md. 45, 265 A. 2d 187 (1970)], the Court of Appeals applied this principle erroneously when it applied the principle to the term "working hours". While the provision inserted into the contract was written by Henry Cunningham's hand it was nevertheless a *negotiated* term and must, therefore, be construed objectively. In *Weber v. Crown Central Petroleum Corp., supra, Orkin v. Jacobson, supra*, and *Kasten Construction Co. v. Rod Enterprises, Inc., supra.* Thus, by failing to apply the substantive law of Maryland to resolve this dispute, the Circuit Court violated this Court's holding in *Erie v. Tompkins, supra.*

IV.

The Opinion of the Court of Appeals Is So Clearly Erroneous as to Allow for Its Being Summarily Reversed.

Because of the serious nature of the Court of Appeals' actions, which had the effect of retrying this case before an appellate tribunal, the grant of this Petition for Certiorari is the only method to achieve the fair goal of justice. Furthermore, because the decision rendered by the Court of Appeals is so clearly erroneous, in light of the facts of this case, a summary reversal is an appropriate remedy available to this Court. *National Hockey League v. Metropolitan Hockey Club*, 427 U. S. 639 (1976); *O'Keefe v. Smith, Hinckman & Gryll Associates, Inc.*, 380 U. S. 359 (1965); *United States ex rel. Robinson v. Solinston*, 316 U. S. 649 (1942). *Cf. Civil Aeronautic Bd. v. American Air Transport*, 344 U. S. 4, 5 (1952) (suggesting that lower Court hear case *en banc.*)

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals summarily reversed.

Respectfully submitted,

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Of Counsel

August 31, 1979

APPENDIX A.

Oral Opinion of U. S. District Court for the District of Maryland.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. 76-870-W
Civil Action

TIDEWATER EQUIPMENT CO., INC.

v.

EQUIPMENT RENTAL CORPORATION
T/A AMERICAN EQUIPMENT RENTAL
COMPANY.

Baltimore, Maryland
October 31, 1977

EXCERPT
FROM TRANSCRIPT OF PROCEEDINGS
ORAL OPINION
of
THE HONORABLE R. DORSEY WATKINS

(A1)

APPEARANCES

For the Plaintiff:
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For the Defendant:
Leon H. A. Pierson
W. Michel Pierson

Reported by: S. M. Lee Schap
Official Court Reporter

Excerpt
From Transcript of Proceedings

The Court: I want to compliment counsel on their succinct arguments and on their presentation of the case, in general.

If I were to take two or three days or a month, I could write what I hope would be simply a learned opinion of great length, but it seems to me it is more important to dispose of the case promptly and I don't think I will ever be more familiar with the facts than I am at the present time.

As the Court has before indicated, it now holds that the contract, Plaintiff's Exhibit 2, was signed by both parties and is a binding contract. Four witnesses testified unequivocally that they saw both parties sign the agreement.

The Defendant's representative, by deposition, testified he could have signed it but he did not recall. He also testified he could not recall writing anything in connection with the preparation of the contract; although, he recognized as his writing the critical words "Bare Rental Rates shall be 'bound on no more than 400 working hours per two-month period.'" The absence of the original has been satisfactorily accounted for. I find that Plaintiff's

Exhibit 2 is a valid contract, and the one upon which this suit is brought.

Plaintiff rented to the Defendant a P and H crane, 6250 Model, 300 ton lift, for use in Canada in connection with the Olympic Games there. The crane was set up in Canada to be used and returned. Plaintiff claims that it was used 1006 hours beyond the 400-hour two-month contract provision, and has sued for damages for the alleged excess use and interest. The Plaintiff's claim is based upon the cab meter readings, which, while somewhat in dispute, are not really critical.

The Defendant contends that the phrase "working hours" is restricted to actual use—lifting and lowering.

Both parties and all witnesses agree that the term "working hours" is unusual. Apparently in connection with the negotiations and signing of the contract, no discussion was had as to its meaning.

In Canada the crane was one of many, all of which had to be ready at all times to lift and lower. Because of the cold weather, the crane had to be sufficiently warmed for immediate use. While the water and oil could be heated by injectors, the testimony is that no one used them at the site because (a) the electric connections were not available and (b) these would not heat the drums, brakes, hoists and so forth, adequately.

There was testimony on behalf of the Plaintiff that merely starting the engine would warm adequately all parts within ten to 25 minutes, testimony which was severely questioned by the Defendant; however, the undisputed evidence was that the practice on the jobsite was to keep the engines running 24 hours a day, if necessary, which would be clocked on the meter, even although there were no hoistings or liftings.

Plaintiff offered no evidence as to how much time was expended on actual hoisting and lowering. The De-

fendant agreed that the crane could not be used more than eight hours a day for hoisting or lowering, but that it had to be available around the clock.

Defendant's testimony was that on some days not more than one pick (lift and lower) occurred, and as I recall, the testimony was that that would take between an hour and an hour and a half.

The evidence further showed that the Defendant had subcontracts with a Canadian company for the use of the same crane. Payment was computed on a meter-hour basis.

The Court is of the opinion that the phrase "working hours" means what it says; the time that the crane is not idling, but working, that is, lifting and lowering. Plaintiff having offered no evidence on this point has failed in its burden of proof and judgment will be entered for the Defendant.

Now, if counsel want to appeal and submit enlarged, proposed findings of fact and conclusions of law, I will be glad to consider them.

(Whereupon, at 3:45 p.m., the trial in the aforementioned case was concluded.)

CERTIFICATION

I hereby certify the foregoing is a true and accurate excerpt from the transcript of proceedings.

/s/ LEE SCHAP
S. M. Lee Schap,
Official Court Reporter

APPENDIX B.

Unpublished Opinion of U. S. Court of Appeals for the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1137

TIDEWATER EQUIPMENT CO., INC.,
Appellant,

v.

EQUIPMENT RENTAL CORPORATION,
T/A AMERICAN EQUIPMENT
RENTAL COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
R. DORSEY WATKINS, SENIOR DISTRICT JUDGE.

Argued December 7, 1978 Decided February 20, 1979

Before WINTER, RUSSELL and WIDENER, Circuit Judges.

Peter F. Axelrad (George W. Liebmann, Frank, Bernstein, Conaway & Goldman, on brief) for Appellant; W. Michel Pierson and Leon H. A. Pierson for Appellee.

WINTER, Circuit Judge:

Tidewater Equipment Company, Inc. (Tidewater) sues for excess rent allegedly due under the lease of a construction crane to Equipment Rental Corporation (Equipment). The lease agreement provided that the specified monthly rental rate was based on a maximum of 200 "working hours" per month. Equipment concedes that the engine of the crane was operated for more than 200 hours per month, but it contends that the term "working hours" was intended to refer only to the time that the crane was actually lifting or lowering material, not to the entire time that the crane engine was idling. The district court agreed with Equipment's interpretation and entered judgment in its favor. We reverse.

I.

The pertinent facts are for the most part undisputed. In late July 1975, a representative of Equipment telephoned William Bozman, vice president of Tidewater, to discuss the possibility of leasing Tidewater's crane. Equipment intended to sublease the crane to Canadian Bellequip for use in construction of the Olympic Stadium in Montreal. Although Tidewater's standard monthly rental for the crane was $20,000, Equipment's representative stated that Canadian Bellequip was unwilling to pay more than $19,000 per month under the proposed sublease. Bozman therefore tentatively expressed a willingness to lease the crane to Equipment for $15,000 per month.

In early August, Bozman called Henry Cunningham, vice president of Equipment. Bozman had received reports that cranes at the Montreal construction site were being used around the clock, and he informed Cunningham that if these reports were accurate an increase in the proposed monthly rental of $15,000 would be necessary.

Cunningham contacted Canadian Bellequip for a clarification of the situation at the construction site, and he then called Bozman back. Cunningham explained to Bozman that concrete blocks might arrive at the site at any time of the day or night. Since there was no room to store the blocks at the delivery site, they had to be lifted by a crane immediately upon their arrival. Cunningham thus told Bozman that the crane would have to be "available" twenty-four hours a day, but he assured Bozman that it would not actually "work" for more than one eight-hour shift per day. Bozman was satisfied with this explanation, and he reiterated his willingness to agree to a monthly rent of $15,000.

An agreement for the lease of a construction crane usually contemplates that the crane will be used no more than eight hours per day and twenty-two days per month, or a total of 176 hours per month. Adherence to this limit is monitored by a meter installed on the upper engine of the crane, which indicates the number of hours that the engine has been running.[1] Canadian Bellequip expressed to Cunningham its dissatisfaction with the standard 176-hour limit. It explained that it might occasionally have to use the crane for a brief period of overtime or on the weekend, and it therefore requested that the sublease provide for a monthly limit of 200 hours. Cunningham acceded to this request. On August 11, a confirming telegram was sent from Canadian Bellequip to Cunningham, containing the sentence: "Suggest you verify hour meter on machine which will not be more than 400 hours cumulative over any 2 calendar month period." This provision was eventually incorporated into the sublease.

On the next day, August 12, Cunningham met with Bozman to conclude their contract negotiations. Bozman presented to Cunningham a draft contract which provided

1. The usual crane has no separate meter to monitor the time that the crane is used for lifting or lowering.

for the standard 176-hour month. Cunningham stated that the draft was unacceptable since Canadian Bellequip demanded a 200-hour month in its sublease. Bozman told Cunningham to write down the provision as he wanted it in the contract. Cunningham then wrote in longhand: "Base Rental Rates shall be based on no more than 400 working hrs. per 2 month period." Bozman's secretary then typed a new contract containing this provision, and both men signed the new contract.[2]

Although it does not appear that the crane was ever used for actual lifting and lowering more than one shift per day, it is undisputed that the crane engine, as indicated by the meter, was left running for more than eight hours per day and on occasion for twenty-four hours per day. Since the concrete blocks might arrive for lifting at any time of the day or night, the crane had to be ready on a few minutes' notice. The crane engine was therefore left running, because a cold engine would require between half an hour and an hour to warm up to the point where it could lift the blocks. The normal practice for keeping the engine warm is not to leave it idling, but rather to use special heating equipment. Equipment's evidence showed, however, that this was not a feasible practice under the weather conditions of Montreal's winter and the inadequate electrical facilities at the site.

Thus, when the crane was finally returned to Tidewater, its meter indicated that the crane engine had been running more than 200 hours per month.[3] Equipment

2. Cunningham testified at trial that he did not recall signing any written lease. The district court found, however, that Cunningham had signed the lease. The correctness of this finding is not questioned on appeal, and in any event it is not clearly erroneous.

3. When Equipment took possession of the crane on August 12, 1975, the meter read 896 hours. When it was returned, seven months later, the meter read 3,300 or 3,302 hours, approximately 904 hours more than the 1,400-hour aggregate monthly limitation.

brought suit against Canadian Bellequip for additional rent for use of the crane beyond the 200-hour monthly limitation in the sublease, and it obtained a judgment in its favor. Despite the position taken by Equipment in *that* suit, it now contends that the 200-hour limitation in its lease with Tidewater refers to hours of actual lifting and lowering, rather than hours that the engine is running, as shown by the meter. It seeks to distinguish the principal lease from the sublease by the presence of the term "working hours" in the former. The district court agreed with Equipment's interpretation of the term "working hours" as referring to hours of actual lifting and lowering. Since Tidewater was unable to show that the crane had been operated for actual lifting and lowering in excess of the 200-hour monthly limitation, it entered judgment for Equipment.

II.

The district court's interpretation of the disputed provision was based on its findings of fact regarding the intent of the parties to the lease. Our review of its decision is thus restricted by the familiar principle that "[f]indings of fact shall not be set aside unless clearly erroneous." F. R. Civ. P. 52(a). While the district court's contract interpretation is thus entitled to great weight, we may reject it if "[w]e are left with the definite and firm conviction that the interpretation was a mistaken one." Webb v. Old Salem, Inc., 416 F. 2d 223 (4 Cir. 1969); *see* United States v. United States Gypsum Co., 333 U. S. 364, 394-95 (1948). After a study of the record, we are convinced that the district court erred.

Both parties agree that the term "working hours" is unusual in a crane lease. Since the term has no accepted or clear meaning, we must ascertain the meaning which the parties intended to give it, as shown by the surrounding

circumstances, including the parties' contract negotiations. *See, e.g.*, Canaras v. Lift Truck Services, Inc., 272 Md. 337, 322 A. 2d 866 (1974).

In reviewing the circumstances surrounding the agreement, we are struck by parallels between Equipment's negotiations with Canadian Bellequip on the one hand and with Tidewater on the other. Canadian Bellequip had demanded that the monthly limitation on the use of the crane be increased to 200 hours from the standard 176. While Cunningham claims that he thought this demand referred to 200 hours of actual lifting and lowering time, he could have no doubt in the matter after August 11, the date of Canadian Bellequip's telegram.[4] This telegram made clear to Cunningham that Canadian Bellequip was requesting 200 *meter* hours per month.

On the very next day, August 12, Cunningham met with Bozman to conclude a contract. At Cunningham's instance, a provision was inserted limiting the rental to 200 "working hours" per month. There can be no doubt that this clause was inserted to accommodate Canadian Bellequip's request.[5] Since Canadian Bellequip had promised

4. The record contains no direct evidence that Cunningham actually received this telegram on August 11. The inference that he received the telegram on the day it was sent is certainly reasonable, however, especially in light of the striking parallel between that telegram and the provision drafted the next day by Cunningham, as discussed hereafter. In any event, the matter of Cunningham's receipt of the telegram on August 11 was within the peculiar knowledge of Equipment, which offered no evidence to the contrary.

5. Cunningham himself testified: "The 400 working hours [per two-month period], that came from the Canadian people." He later testified:

> [A]s a rerenter, [we] are in between the lessor and [sub] lessee. Correct?
>
> So, all I did was report to Mr. Bozman what was told to me by Canadian Bellequip, and they said, "We want 400 hours for two months;" so, that is the number I took . . . .

to limit its use of the crane to 200 meter hours per month, Cunningham would have no reason to require a provision permitting 200 hours of actual lifting and lowering. The evidence is thus clear and unequivocal that the limitation on "working hours" was intended to refer to hours as indicated on the engine meter.

Even if the meaning of the contract provision were less clear, we would be constrained to find in favor of Tidewater. To the extent that the term "working hours" is ambiguous, Equipment must be held responsible for not making its intent more clear. Basic principles of contract construction instruct that if the meaning of a provision cannot otherwise be ascertained, it will be interpreted against the party who drafted it. *See, e.g.*, Lakrest Development Co. v. Eisele, 258 Md. 45, 265 A. 2d 187, 189 (1970).[6]

5. (Cont'd.)
Further evidence of the connection between the telegram and the provision drafted by Cunningham is the peculiar reference to 400 hours per two-month period, rather than 200 hours per month, in both documents. In light of the parallels between the two documents and their proximity in time, Equipment's contention that the provision drafted by Cunningham was not intended to pass along the arrangement reached with Canadian Bellequip, but rather was meant to permit around-the-clock idling of the crane engine, is too implausible to be accepted.

6. Moreover, the equities in this case appear to favor Tidewater. Equipment has brought suit against Canadian Bellequip for additional rent owing under the sublease for use of the crane in excess of 200 meter hours per month. It obtained judgment against Canadian Bellequip in the approximate amount of $129,000, with interest, and that judgment has been marked "satisfied." Equipment Rental Corp. v. Canadian Bellequip, No. 77-1808 (E. D. Pa. Jan. 10, 1978). To the extent that this judgment has been paid, Equipment will be unjustly enriched if it is totally excused from paying Tidewater the excess rent owing under the principal lease. Although we do not view this factor as dispositive, we note it as a further consideration favoring recovery by Tidewater.

We therefore reverse the decision of the district court and remand the case for entry of judgment in favor of Tidewater and for the calculation of damages.

REVERSED.

APPENDIX C.

Order of U. S. Court of Appeals for the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1137

TIDEWATER EQUIPMENT CO., INC.
Appellant,

versus

EQUIPMENT RENTAL CORPORATION,
t/a AMERICAN EQUIPMENT RENTAL CO.,
Appellee.

ORDER

(Filed April 3, 1979)

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Russell, and Judge Widener.

For THE COURT,

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D.

Letter of U. S. Court of Appeals for the Fourth Circuit Denying Rehearing.

CLERK'S OFFICE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Courthouse
Tenth & Main Streets
RICHMOND, VIRGINIA
23219

Telephone
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August 2, 1979

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BLANK, ROME, KLAUS & COMISKY
Four Penn. Center Plaza
Philadelphia, PA 19103

Re: 78-1137, Tidewater Equipment Co., Inc. vs.
Edquipment Rental Corp., etc.

Gentlemen:

I have been directed by the court to advise counsel that the request for reconsideration of the denial of the petition for rehearing is denied.

Sincerely yours,

WILLIAM K. SLATE, II

By CAROL R. LEMON

CRL:fls

(Mr.) Carol R. Lemon
Chief Deputy Clerk

APPENDIX E.

Order of Supreme Court of the United States Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States

No. A-1069

EQUIPMENT RENTAL CORPORATION,
t/a AMERICAN EQUIPMENT RENTAL COMPANY,
Petitioner,

v.

TIDEWATER EQUIPMENT CO., INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 31, 1979.

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 12th day of June 1979.

APPENDIX F.

Affidavit in Support of Appellee's Petition for Reargument.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1137

TIDEWATER EQUIPMENT CO., INC.,
Plaintiff-Appellant,

vs.

EQUIPMENT RENTAL CORPORATION,
T/A AMERICAN EQUIPMENT
RENTAL COMPANY,
Defendant-Appellee.

AFFIDAVIT IN SUPPORT OF APPELLEE'S PETITION FOR REARGUMENT

Norman L. Holmes, Esquire, being duly sworn according to law, hereby deposes and says:

1. That I am a member of Blank, Rome, Comisky & McCauley, attorneys for Equipment Rental Corporation, t/a American Equipment Rental Company ("Equipment"), and that I was the attorney of record in the action

captioned *Equipment Rental Corporation, t/a American Equipment Rental Company v. Procor Limited, t/a Canadian Bellequip,* Civil Action No. 77-1808 in the United States District Court for the Eastern District of Pennsylvania;

2. That on May 24, 1977, I filed with the Clerk of the United States District Court for the Eastern District of Pennsylvania a Complaint in Confession of Judgment and a Confession of Judgment against Procor Limited, t/a Canadian Bellequip ("Canadian") in the amount of $128,035.71, together with interest and attorneys fees. The Clerk of the United States District Court for the Eastern District of Pennsylvania thereupon entered Judgment in the said amount. (Copies of the Complaint in Confession of Judgment, Confession of Judgment and Judgment are included in the Joint Appendix filed in this cause of action as Plaintiff's Exhibits "6A", "6B", and "6C" respectively, at pages 40, 61 and 63 of the Joint Appendix, and incorporated herein by reference);

3. That on June 24, 1977, I was served by Canadian with a Motion to Strike or to Open the Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. This Motion was filed of record with the Court on July 6, 1977;

4. That on October 14, 1977, I filed a Motion for a Transfer of Venue at Civil Action No. 77-1808. The purpose of that Motion was to transfer venue of Civil Action No. 77-1808 in the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Maryland, and thereafter to consolidate the action brought by Equipment against Canadian with the action brought by Tidewater Equipment Co., Inc. ("Tidewater") at Civil Action No. Wx 76-870. A copy of that Motion is attached hereto, made a part hereof, and marked Exhibit "1".

5. That on October 19, 1977, I was served with Canadian's Memorandum of Law in Opposition to Plaintiff's Motion for a Transfer of Venue. In opposition to Equipment's Motion to Transfer Venue, Canadian argued, *inter alia,* at page 4 of its Memorandum:

> In fact consolidation would be inappropriate since *the cases involve entirely separate leases executed by different parties at different times. There is nothing in this record to indicate that these documents were exactly the same or even similar in content.* The instant case is thus distinguishable from those cited by plaintiff, in which defense motions to transfer were granted in order to facilitate consolidation of complex securities cases, arising from the same transaction or course of conduct and involving the same issues of law and fact. [Emphasis supplied].

A copy of Canadian's Memorandum is attached hereto, made a part hereof, and marked Exhibit "2".

6. That the foregoing Motion to Transfer Venue was not ruled upon by the Court because of the ongoing settlement negotiations between counsel;

7. That on November 29, 1977, an Order was entered by the Clerk of the United States District Court for the Eastern District of Pennsylvania, dismissing Equipment's cause of action against Canadian, it having been reported that the issues between the parties had been settled. A copy of this Order is attached hereto, made a part hereof, and marked Exhibit "3";

8. That on January 5, 1978, a Complete and Final Mutual Release and Settlement Agreement ("Settlement Agreement") was executed by and between Equipment and Canadian. Pursuant to the Settlement Agreement, Canadian agreed to pay $65,000. to Equipment, Equipment agreed to mark "Satisfied" the judgment which had been entered in its favor and against Canadian, and each party mutually released the other from any liability from all claims arising out of the cause of action alleged at Civil Action No. 77-1808 filed in the United States District Court for the Eastern District of Pennsylvania. A copy of the Settlement Agreement is attached hereto, made a part hereof and marked Exhibit "4";

9. That on or about January 10, 1978, in accordance with the terms of the Settlement Agreement, I caused to be filed a Satisfaction of Judgment at Civil Action No. 77-1808 in the United States District Court for the Eastern District of Pennsylvania, marking the judgment which had been entered "Satisfied";

10. That from the proceeds of the settlement with Canadian, Equipment paid to Tidewater $20,923.99 to compromise Counts I, II and IV of Tidewater's claims against Equipment, as evidenced by the Pre-Trial Order which is included in the Joint Appendix at page 9;

11. That from the proceeds of the settlement with Canadian, Equipment paid legal fees to the firm of Blank, Rome, Klaus & Comisky (predecessor to Blank, Rome, Comisky & McCauley) and to Pierson and Pierson.

12. That at no time did Equipment receive from Canadian, other than rental payments, any additional sum of money other than that amount which had been set forth in the Settlement Agreement, to wit, $65,000.

13. That I have read the foregoing Affidavit and the facts contained therein are true and correct to the best of my knowledge, information and belief.

Respectfully submitted,

/s/ NORMAN L. HOLMES
Norman L. Holmes

Sworn to and subscribed to before me this 14th day of March, 1979.

/s/ HANNAH ROSING
Notary Public

My Commission Expires: January 20, 1983